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No. 00-1438

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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I. The Eleventh Circuit Squarely Held that Contempt Is The Only Means Of Enforcing Or Clarifying Consent Decrees And Reversed The District Court's Declaratory Judgment On That Basis

The State does not argue that contempt should be the only means of enforcing or clarifying consent decrees. Nor does it dispute that an inter-Circuit conflict exists if the Eleventh Circuit has adopted a "contempt-only" rule for enforcement or clarification of consent decrees. It argues instead that a "contempt-only" rule has not been adopted and that the Eleventh Circuit permits the full range of equitable remedies allowed by other Circuits. The decision below shows that not to be the case. In the court's own words, "consent decrees are to be enforced . . . through the trial court's civil contempt power." Pet. App. A, pp. 18a-19a. The unequivocal nature of this rule was recently confirmed by the Eleventh Circuit when it "reiterated" the rule in the current case by stating that "*Reynolds v. Roberts* [sets forth] the proper procedure for seeking the enforcement of a consent decree" by requiring that "consent decrees are enforced through the trial court's civil contempt power" and that this is a rule "which a party to a consent decree ***must follow*** in order to seek enforcement of the provisions of the decree" regardless of whether the case has been "administratively closed" for many years. *Florida Assoc. for Retarded Citizen, Inc. v. Bush*, 246 F.3d 1296, 1298 (CA11 2001) (emphasis added).

The Eleventh Circuit's application of the "comtempt-only" rule is unequivocal and absolute. So much so, that attorneys are subject to sanctions if they even ask for any less intrusive remedy, such as a declaratory judgment or other clarification. Counsel in the current case were sharply admonished because they "did not invoke this time-honored procedure [of seeking contempt] to obtain enforcement of . . . Consent Decree I." Pet. App. A, pp. 18a-19a. In the view of the Eleventh Circuit, sanctions should be imposed against such counsel because "[i]nstead of seeking enforcement of the consent decree . . . through the district court's

contempt power, plaintiffs' counsel took another approach in two steps" — first seeking injunctive relief to preserve the *status quo* until the merits of the Decree-interpretation could be reached, followed by entry of a declaratory judgment as an alternative remedy to contempt. Pet. App. A., p. 20a; Pet. App. B, pp. 92a-98a.

A. The Declaratory Judgment Was Not Reversed On Injury Grounds

Respondents argue that the Eleventh Circuit reversed the district court not on the basis of such a "contempt-only" rule, but because no members of the plaintiff class were injured in the way found by the district court. That argument confuses the two appeals consolidated below. The ruling in the first appeal — No. 97-6347 — involved the preliminary injunction entered April 10, 1997. The Eleventh Circuit reversed, in part, because it disagreed with the district court's finding that class members were injured (albeit without applying the clearly erroneous standard review). Pet. App. A, pp. 21a-22a. The ruling in the second appeal — No. 98-6192 — involved the declaratory judgment entered March 3, 1998. The appeals court reversed the declaratory judgment not on the basis of any "lack of injury" rationale, but because of the "contempt-only" rule. Pet. App. A, pp. 23-24a.[1]

In the latter declaratory judgment appeal, the Eleventh Circuit held that although the district court "recognized that an application for injunctive relief is an inappropriate device for enforcing a consent decree, . . . it *sua sponte* transformed the application for injunctive relief into an application for a declaratory judgment" and "failed to realize . . . that it was

1. The two appeals were discussed in separate sections of the Opinion below, with Appeal No. 97-6347 being addressed § II A and the appeal in No. 98-6192 being addressed in § II B. Both appeals were subject to the "contempt-only" ruling, but only Appeal No. 97-6347 involved the additional ground that plaintiff class members were not injured by the challenged grievances despite the trial court's finding to the contrary. *Compare* Pet. App. A, pp. 20a-22a *with* Pet. App. A, pp. 22a-26a.

entering a judgment that could not withstand appellate review" under the Circuit's "contempt-only" rule. Pet. App. A, pp. 24a, 27a. The Court stressed the difference between the two appeals again in the sanctions section of the opinion, holding that "[i]n No. 98-6192" the district court "should have dismissed counsel's application for a permanent injunction under the authority of *Newman v. Alabama*, 683 F.2d at 1318." Pet. App. A, p. 27a. The decision in *Newman*, of course, is the source of the Eleventh Circuit's unique "contempt-only" rule.

B. The Eleventh Circuit Recognizes No Exceptions To The "Contempt-Only" Rule

Again seeking to ameliorate the impact of the Eleventh Circuit's ruling, Respondents argue that other forms of relief to enforce consent decrees are still available in the Eleventh Circuit whenever contempt is not an "adequate remedy at law." The Eleventh Circuit necessarily rejected this limiting argument in the case below when it extended the "contempt-only" rule to declaratory judgments. By statute, declaratory judgments are not subject to the "no adequate remedy at law" requirement. The provisions of 28 U.S.C. § 2201(a) state that a district court "may declare the rights and other legal relations of any interested party . . . *whether or not further relief is or could be sought*." *Id.* (emphasis added). Federal Rule of Civil Procedure 57 states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief where it is appropriate." Fed. R. Civ. P. 57. The Advisory Committee Note to that Rule further states that declaratory relief "may be joined [to] a demand for coercive relief, cumulatively, or in the alternative, but when coercive relief only is sought but is deemed ungrantable, or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights." Fed. R. Civ. P. 57 Advisory Committee Note of 1937 (citation omitted); *see also Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("declaratory relief may be considered independently of whether other forms of relief are appropriate"). As explained in *Wright, Miller and Kane*, declaratory judgments provide:

> a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not yet done so. The declaratory-judgment remedy enlarges the judicial process and makes it more pliant and malleable by putting a new implement at the disposal of the courts. * * * It permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty.

Wright, Miller & Kane, Federal Practices & Procedure, § 2751. The Eleventh Circuit's prohibition on alternative remedies even where they are *not* subject to the "adequate remedy at law" rationale of *Newman*, 683 F.2d at 1318, reveals the absolute nature of the Circuit's "contempt-only" rule.

Even if the "adequate remedy at law" rationale of *Newman* left open some possibility that other remedies might still be available whenever contempt is shown to be inadequate, that would still leave a significant inter-Circuit conflict because the other courts of appeals have adopted a different rule that allows less intrusive remedies to be imposed regardless of whether contempt would also be an adequate remedy. The other Circuits allow attorneys and the district courts to consider the comparative advantages of alternative remedies, including whether contempt would be overkill. That was the finding of the district court here. Pet. App. B, pp. 91a-98a.

Since the present Petition was filed, the Third Circuit has rejected a "contempt-only" rule, citing "case law that directly and clearly contradicts [the] claim that a court can exercise its compliance enforcement power only via its contempt power." *Holland v. New Jersey Dep't of Corrections*, 246 F.3d 267, 282 & n.14 (CA3 2001) (citing Second and Fourth's Circuits' decisions in *Brewster v. Dukakis*, 675 F.2d at 2-3 and *Alexander v. Hill*, 707 F.2d at 783); *see also Gates v. Collier*, 616 F.2d 1268, 1271 (CA5 1980). Likewise, the Fourth Circuit has

expressly rejected the contention that a lack of finding of contempt should "preclude exercise of inherent equitable powers to achieve fair remedial results," finding that a district court "is invested with broad equitable powers and simply should not be compelled to operate in a *punishment or nothing* atmosphere," but rather, should be able to concentrate its attention on "[a]lleviation rather than sanction." *Alexander v. Hill*, 707 F.2d 780, 783 (CA4 1983) (emphasis added).[2]

The Eleventh Circuit's analysis is also fundamentally in conflict with that of other Circuits, such as the Fifth and Seventh Circuits, which have recognized that contempt is not an available remedy "at law," but is merely an alternative *equitable* remedy, which does not operate to preclude all other equitable remedies in the manner held in *Newman*, 683 F.2d at 1319. *Matter of Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 884 (CA7 1990) ("civil contempt . . . originated . . . in equity, as a device for enforcing compliance with equitable decrees") (citing *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 457 (1932)); *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 243 (CA5 1964) (civil contempt characterized as an equitable remedy).

The absolute nature of the Eleventh Circuit's "contempt-only" rule is revealed not only in its rejection of the district court's finding that a lesser remedy than contempt was warranted in the particular circumstances of this case, but also in its treatment of counsel. The Eleventh Circuit's ferocious rebuke of plaintiffs' counsel for seeking less intrusive remedies would have no basis at all if the Eleventh Circuit panel had believed the district court was permitted to consider other remedies.

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2. The All Writs Act empowers district courts in every other Circuit to issue whatever writs they find "necessary or appropriate." 28 U.S.C. § 1651(a)

C. The Eleventh Circuit's Comments About "Rewriting" Or Modifying The Decree Are The Product Of Its "Contempt-Only" Rule

The State argues that the Eleventh Circuit's comments about the district court "rewriting" the consent decree indicates that courts may still *interpret* their decrees by means other than contempt. That is not an inference that can be drawn from the decision below and even if it could, that does not eliminate the Circuit split. First, allowing a court to *modify* a decree does not mean that they may also interpret or enforce it *as written* by any means other than contempt. Plaintiffs sought to enforce the Decree as written, not modify it. The Eleventh Circuit permits interpretation and enforcement only via contempt. "Modification" is an entirely different thing governed by this Court's decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *See Holland*, 246 F.3d at 282 & n.13 (holding that courts must distinguish modification powers from enforcement powers because "there are distinct bodies of jurisprudence and different standards associated" with each).

Second, the Eleventh Circuit's comments about "rewriting" or modifying a consent decree do not imply a willingness to allow such decrees to be interpreted or enforced by means other than contempt. The Eleventh Circuit inferred just the opposite — that any interpretation of a decree through means other than contempt necessarily constitutes a "rewriting" of the decree or else contempt would have been sought. Pet. App. A, p. 19a-20a. In the Eleventh Circuit's view, "[t]he reason why plaintiffs' counsel did not move the court for an order to show cause is obvious: the Department had not disobeyed any of the mandates of the consent decree" (*id.*) because the decree itself permits grievances to be filed and "[t]o say that the Revised Complaint Procedures somehow 'violates' Consent Decree I, as plaintiffs' counsel contended . . . is more than sophistic; it is preposterous." Pet. App. A, pp. 23a-24a. The problem, however, was not that the grievance procedure itself violated the Consent Decree on its face, but that *the use* of the procedure did so

whenever provisional appointments were awarded *before* a vacancy was opened for applications and an equal opportunity to compete.

The district court's reasons for not granting contempt, however, did not involve rewriting the Decree. Pet. App. B, pp. 92a-96a. The district court's decision set forth precisely how the challenged grievances awarding provisional appointments violated the consent decree's existing command that vacancies be filled through open competitive means. Pet. App. B, pp. 85a-86a, 91a. The Consent Decree itself is unambiguous in requiring that "[p]rovisional appointments will be made *only* in accordance with Section 670-X-9-3(3)(d) of the Rules of the Personnel Department, and in no circumstances will be used to avoid black eligibles or the other provisions of this Decree." Pet. App. D, pp. 133a-134a. The provisional appointments that were being given away through grievances violated both of these unambiguous commands of the Decree — they were not made "only in accordance" with the Personnel Department rule, which required open competition, and they "avoid[ed] black eligibles" by considering no one for the vacancy except the grievant.[3] Pet. App. B, pp. 85a-87a, 90a-91a. Moreover, the Decree explicitly provides that the district court "retains jurisdiction to decide any and all questions or disputes which arise under this Decree," Pet. App. D., p. 160a, and "[t]o the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court." Pet. App. D., p. 158a. The district court's findings about the Decree's meaning are the correct ones, not the substituted findings of the Eleventh Circuit which considers enforcement of a consent decree by any means other than contempt to necessarily be a "rewriting" of the Decree.

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3. A "provisional appointment" under the Decree lasts until "the creation of new registers using newly validated minimum qualifications and examinations." Pet. App. D, pp. 123a-124a. That has not yet occurred in this case.

II. Notice And Hearing Should Precede Findings Of Guilt In A Published Opinion That Injures Counsels' Reputation

Respondents argue that certiorari is inappropriate whenever the appellate court finds counsel guilty of serious improprieties, but afterward remands for a determination whether to award sanctions for such misconduct, characterizing such a ruling as "interlocutory." The issue raised in the Petition, however, is not interlocutory or capable of being cured through a post-deprivation hearing on remand. The constitutional error has already occurred and no proceedings on remand can correct it. The Petition seeks review of the *very decision to remand*, arguing that such a remand should have come *before* findings of guilt were spread across the pages of the Federal Reporter, not after.

The notice and hearing required by due process must come *before* such publication and without findings of guilt that are binding on the district court on remand. The district court on remand has declared itself bound by the Eleventh Circuit's findings of serious misconduct.[4] The Court of Appeals, in denying the petition for rehearing, refused to lift those findings so that a real adversarial determination of guilt or innocence could be made for the first time. Absent this Court granting *certiorari*, plaintiffs' counsel are unlikely to ever be given an opportunity to show that they are innocent of the *sua sponte* findings of guilt entered by the Eleventh Circuit.

III. The Eleventh Circuit Reversed Findings Of Fact Without Regard To The Clearly Erroneous Standard Of Review

Although the Respondents argue that the Eleventh Circuit reversed the district court on the basis of a factual finding that no members of the plaintiff class were injured by the provisional appointments challenged below, they then ignore that factual finding when they come to the third question presented — "whether an appellate court departs from the accepted course of judicial process by making findings of fact

4. *See* Order entered January 3, 2001 (Doc. no. 4680).

based on its own erroneous construction of the evidence in the record." At that point in their opposition to *certiorari*, the Respondents argue that the Eleventh Circuit made no findings of fact of its own. Both positions cannot be true.

The Eleventh Circuit, in fact, substituted its own findings of fact for those of the district court on the issue of class members' injuries from the challenged provisional appointments. The district court made detailed findings that class members were not only injured by the challenged promotions, Pet. App. B, pp. 85a-92a, but that their injuries were sufficiently serious to cause "irreparable harm." *Id.* and Pet. App. G, pp. 207a-212a. These findings were supported by extensive testimony from both the injured class members and defendants' officials, showing that qualified class members were being deprived of an equal opportunity to apply and compete for positions that were being awarded by *pre-competition* grievances.[5] There was no appeal of those findings, and no argument that they were clearly erroneous in the Eleventh Circuit. The Court of Appeals raised the issue of injury *sua sponte*, reversing the trial court's findings that class members *were* injured on the basis of an appellate finding that class members *were not* injured. It did so without ever mentioning the district court's contrary factual findings, the extensive evidence that supported such findings, or the clearly erroneous standard of review.

The same improper use of appellate findings of fact occurred in several other contexts, including the finding that only non-black grievants were precluded from pursuing anti-competitive grievances. Plaintiffs' motions were not directed at precluding such grievances only by white employees, but specifically listed black employees by name in the body of the motion as ones that should be prohibited, such as the Roundtree brothers and Willie Mitchell. Pet. App. I, pp. 217a-218a; Pet. App. J,

5. Pet. App. B, pp. 85a-92a; R142-204-205; R137-682-687; R141-186-190, 196-197; R134-72; R135-301-305; R136-486-492, 563-73, 588-89, 595-96, 617-25,646-48, 635-36; R135-234-38,282-83.

pp. 226a, 229a & n.2 (defendants conceding race of grievants). The district court did not grant that motion, as Respondents claim, but explicitly entered an order *denying it* "[b]ased upon *the agreement of the parties* that defendants will temporarily cease processing grievances of the type that are the subject of the motion." Pet. App. H, pp. 214a-215a (emphasis added). It is undisputed that this included grievances by both black and white employees. Pet. App. I, pp. 217-218a; Pet. App. J, pp. 226a, 229a & n.2. The Eleventh Circuit's findings to the contrary are unsupported by the evidence and beyond its authority as an appellate court.

IV. The Plain Language Of The Appellate Mandate Overturns Orders Not Before The Eleventh Circuit

Respondents contend that no one has yet argued for any orders being vacated on remand except the two that were appealed from, but that does not undo the plain words of the appellate mandate: "The Court is instructed to restore the case to the *status quo ante*, which means nothing has happened in this case since August 9, 1995. . . ." Pet. App. A, p. 28a. It will be too late to do anything about such clear-cut instructions after the petition for *certiorari* is denied.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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